Supreme Court, U.S.
FILED

10-581 NOV 24 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DONAHUE DEWAR AND SHARON KING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Section 924(c) of Title 18 requires specified mandatory consecutive sentences for committing certain weapons offenses in connection with "any crime of violence or drug trafficking crime," "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. 924(c)(1)(A).

The question presented is whether the "except" clause permits a district court not to impose a mandatory minimum consecutive sentence under Section 924(c) if the defendant is also subject to a greater mandatory minimum sentence on a different count of conviction charging a different offense involving different conduct.

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DONAHUE DEWAR AND SHARON KING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is unreported but is available at 2010 WL 1718727.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2010. A petition for rehearing was denied on August 31, 2010 (App., *infra*, 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c)(1) of Title 18 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 8a-9a.

STATEMENT

1. Section 924(c)(1) of Title 18 makes it unlawful to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of, a drug trafficking crime or a crime of violence. See 18 U.S.C. 924(c)(1)(A). The minimum sentence for that offense is five years of imprisonment, "[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." *Ibid.* The term of imprisonment must be "in addition to the punishment provided for"—and run consecutively to the sentence imposed for—the underlying "crime of violence or drug trafficking crime." *Ibid.*; see 18 U.S.C. 924(c)(1)(D)(ii) ("Notwithstanding any other provision of law * * * no term of imprisonment imposed * * * under this subsection shall run concurrently with any other term of imprisonment imposed * * *, including any term of imprisonment imposed for the [underlying] crime.").

In *Abbott* v. *United States*, No. 09-479 (Nov. 15, 2010), this Court held that under the "except" clause, "a defendant is subject to a mandatory, consecutive sentence for a [Section] 924(c) conviction, and is not spared from that sentence by receiving a higher mandatory minimum on a different count of conviction." *Abbott*, slip op. 3.

2. Following a jury trial in the United States District Court for the Southern District of New York, respondents were convicted of various drug-trafficking offenses and possession of a firearm in furtherance of a

drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). The district court determined that respondent Dewar was subject to mandatory minimum terms of 20 years of imprisonment on certain drug trafficking convictions. Dewar Sent. Tr. 36. The court sentenced respondent Dewar to 240 months of imprisonment, consisting of various terms on the drug-trafficking convictions, and a five-year term on the Section 924(c) conviction, all to run concurrently. Dewar Judgment 1-3. The district court determined that respondent King was subject to mandatory minimum terms of 10 years of imprisonment on certain drug-trafficking convictions. King Sent. Tr. 32. The court sentenced respondent King to 121 months of imprisonment, consisting of various concurrent terms on the drug-trafficking convictions, and no term of imprisonment on the Section 924(c) conviction. King Judgment 1-3.

3. All parties appealed, and the court of appeals affirmed in all respects. App., *infra*, 1a-6a. As relevant here, the government argued that the district court erred in failing to impose consecutive terms of at least five years of imprisonment on respondents' Section 924(c) convictions. Gov't C.A. Br. 73-75. The government acknowledged, however, that this was not error under then-controlling circuit precedent, which held that the mandatory minimum consecutive sentences provided in Section 924(c) are "inapplicable where the defendant is subject to a longer mandatory minimum sentence for a drug trafficking offense that is part of the same criminal transaction or set of operative facts as the firearm offense." *Id.* at 74 (quoting *United States* v. *Williams*, 558 F.3d 166, 171 (2d Cir. 2009), petition for cert. pending, No. 09-466 (filed June 8, 2010), and citing *United States* v. *Whitley*, 529 F.3d 150, 158 (2d Cir. 2008)). The

court of appeals accepted this concession, though it acknowledged that this Court "ha[d] granted two petitions for writs of certiorari on this issue," referring to *Abbott*, *supra*, and its companion case, *Gould* v. *United States*, No. 09-7073. App., *infra*, 5a-6a.

REASONS FOR GRANTING THE PETITION

This Court's decision in *Abbott*, *supra*, overruled the circuit precedent on which the court of appeals relied in affirming respondents' sentences. See *Abbott*, slip op. 5 n.2 (citing *United States* v. *Williams*, 558 F.3d 166, 171 (2d Cir. 2009)). Under *Abbott*, a defendant—like respondents here—"is not spared from [the mandatory consecutive Section 924(c)] sentence by virtue of receiving a higher mandatory minimum on a different count of conviction." *Id.* at 3. Thus, both respondents should have received terms of at least five years of imprisonment on their Section 924(c) convictions, to run consecutively to the terms of imprisonment imposed on their other offenses of conviction. The appropriate course would be to vacate the court of appeals' judgment and remand for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded for further proceedings in light of *Abbott* v. *United States*.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

NOVEMBER 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 08-5958-cr, 08-6222-cr, 09-1338-cr, 10-0403-cr

UNITED STATES OF AMERICA,
APPELLEE-CROSS-APPELLANT

v.

CHARLES ERNEST DEWAR, ALSO KNOWN AS
TROOPER, DEFENDANT

DONAHUE DEWAR, ALSO KNOWN AS BLOOD,
ALSO KNOWN AS KIRK DAWAR, AND SHARON KING,
DEFENDANTS-APPELLANTS-CROSS-APPELLEES

Filed: Apr. 29, 2010

SUMMARY ORDER

Before: DENNIS JACOBS, Chief Judge, JOSEPH M. MCLAUGHLIN, ROBERT D. SACK, Circuit Judges.

Appeals and cross-appeals from judgments of the United States District Court for the Southern District of New York (Robinson, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgments of the district court be **AFFIRMED**.

Defendants-appellants-cross-appellees Donahue Dewar and Sharon King appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Robinson, *J.*), following a jury trial. The government cross-appeals from the judgments of conviction on a narrow issue relating to the sentences imposed on Dewar and King. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

For substantially the reasons stated by the district court in its September 6, 2007 amended decision and order, we reject defendants' challenges to the evidence recovered from the Lexus automobile (the "Lexus") and from Apartment 1 at 3443 Mickle Avenue (the "Residence"). Reviewing for abuse of discretion, we conclude that the district court properly denied an evidentiary hearing regarding the police stop of the Lexus because Dewar failed to contest the facts presented in the declaration of Detective Sergeant Edward Lucas (the "Lucas Declaration") and thereby failed to create a material issue. *See United States v. Finley*, 245 F.3d 199, 203 (2d Cir. 2001).

Reviewing the district court's factual findings for clear error and legal determinations *de novo*, we conclude that the district court properly denied defendants' motions to suppress the evidence recovered from the Lexus and the Residence. *See United States v. Rodriguez*, 356 F.3d 254, 257 (2d Cir. 2004). First, the district court properly determined that probable cause supported the Lexus stop and the arrests of Dewar and his brother based on (i) the indicia of reliability of the confidential informant (the "CI") set forth in the Lucas Declaration, (ii) the monitored and recorded conversations

between the CI and defendants, and (iii) police surveillance of the Residence. *See Caldarola v. Calabrese*, 298 F.3d 156, 162 (2d Cir. 2002) ("In general, probable cause to arrest exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." (internal quotation marks omitted)).

Second, regarding the Residence, the district court properly rejected defendants' challenges based on the particularity of the search warrant and the purported staleness of the information described in the affidavit submitted in support of the search warrant. The search warrant—sought by local police and issued by a local judge for purposes of a local investigation—did not have to satisfy the 10-day requirement of the then-current version of Federal Rule of Criminal Procedure 41(e)(2)(A)(i). *See United States v. Burke*, 517 F.2d 377, 382 (2d Cir. 1975). A single sentence in the Statement of Facts of Dewar's pre-trial motion failed to raise an argument that the seizure of objects beyond the purported scope of the search warrant's description rendered the police conduct an impermissible general search, and defendants thus waived any such argument pursuant to Federal Rule of Criminal Procedure 12(b)(3)(C).

We reject defendants' challenges to the jury instructions. The district court properly instructed the jury regarding Dewar's knowledge and intent. *See United States v. Gilliam*, 994 F.2d 97, 102 (2d Cir. 1993) ("[T]he cases interpreting [Federal Rule of Evidence] 404(b) allow the district court to do essentially what was done in this case: the defendant does not challenge the ele-

ment of the crime, the jury is told that the element of the crime is met, but no extraneous evidence to prove that element is introduced."); *accord United States v. Tarricone*, 996 F.2d 1414, 1421 (2d Cir. 1993); *United States v. Colon*, 880 F.2d 650, 659 (2d Cir. 1989). Because both Dewar and King were convicted of the conspiracy charged in Count One of the relevant indictment, Defendants cannot demonstrate plain error based on the district court's omission of an instruction that the CI could not be a co-conspirator during his cooperation with the investigation. Similarly, Defendants cannot establish plain error based on the district court's omission of specific unanimity charges as to (i) the object of the conspiracy for Count One in light of the jury's unanimous finding that the conspiracy involved five or more kilograms of cocaine; (ii) the predicate drug offense for Count Five in light of the jury's unanimous conviction on each of the three predicate offenses, *see United States v. Gomez*, 580 F.3d 94, 103-04 (2d Cir. 2009); or (iii) the particular firearm for Count Five, *see, e.g., United States v. Perry*, 560 F.3d 246, 257 (4th Cir. 2009); *United States v. Wise*, 515 F.3d 207, 214-15 (3d Cir. 2008); *United States v. Hernandez-Albino*, 177 F.3d 33, 40 (1st Cir. 1999); *United States v. Morin*, 33 F.3d 1351, 1353-54 (11th Cir. 1994); *United States v. Correa-Ventura*, 6 F.3d 1070, 1075-87 (5th Cir. 1993).

Assuming King's severance motion was properly presented, and reviewing for abuse of discretion, the district court properly denied it. *See United States v. Yousef*, 327 F.3d 56, 150 (2d Cir. 2003). The district court carefully instructed the jury that King contested the knowledge and intent element of the charged offenses, thereby minimizing any prejudice arising from the jury instructions regarding Dewar's knowledge and

intent. *See United States v. Snype*, 441 F.3d 119, 129 (2d Cir. 2006) ("As the Supreme Court has frequently observed, the law recognizes a strong presumption that juries follow limiting instructions.").

We reject Dewar's challenges relating to the government's filing of a prior felony information. Although the district court omitted the colloquy required under 21 U.S.C. § 851(b), it did not rely on the prior felony information in sentencing Dewar:

> [I]t is my view that a sentence of twenty years or 240 months was or is the appropriate sentence regardless of what the mandatory minimum is; that in light again of this defendant's history and characteristics and the circumstances of this offense, that some very significant punishment needs to be put in place. And, so, whether a ten or a twenty-year mandatory minimum sentence were found, I would have imposed a sentence of 240 months, and I just want that to be clear.

This lucid statement renders any error harmless. *See United States v. Deandrade*, — F.3d —, 2010 WL 842324, at *4 (2d Cir. Mar. 12, 2010). Moreover, Dewar failed to rebut the "presumption of regularity" attaching to the government's filing of the prior felony information. *United States v. Sanchez*, 517 F.3d 651, 671 (2d Cir. 2008).

The government cross-appeals the district court's decisions not to impose consecutive sentences for Dewar and King's 18 U.S.C. § 924(c) convictions. The government concedes that the district court complied with the law of this Circuit, but contends that the law of this Circuit is error. *See United States v. Williams*, 558 F.3d

166 (2d Cir. 2009); *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008). As a preliminary matter, the government requests that we defer ruling on the cross-appeals until the legal issue has been clarified by the Supreme Court, as the government expects. We are aware that the Supreme Court has granted two petitions for writs of certiorari on this issue. *See United States v. Gould*, 329 Fed. App'x 569 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 1283 (Jan. 25, 2010) (No. 09-7073); *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009), *cert. granted*, 130 S. Ct. 1284 (Jan. 25, 2010) (No. 09-479). However, a "panel is bound by prior decisions of this court unless and until the precedents established therein are reversed *en banc* or by the Supreme Court." *United States v. Jass*, 569 F.3d 47, 58 (2d Cir. 2009). Accordingly, we conclude that the district court properly declined to impose the consecutive sentences provided in § 924(c).

We have considered all of the contentions in these appeals and cross-appeals and have found them to be without merit. Accordingly, the judgments of the district court are hereby **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 08-5958-cr, 08-6222-cr, 09-1338-cr, 10-040 -cr

UNITED STATES OF AMERICA,
APPELLEE-CROSS-APPELLANT

v.

CHARLES ERNEST DEWAR, ALSO KNOWN AS
TROOPER, DEFENDANT

DONAHUE DEWAR, ALSO KNOWN AS BLOOD,
ALSO KNOWN AS KIRK DAWAR, AND SHARON KING,
DEFENDANTS-APPELLANTS-CROSS-APPELLEES

[Filed: Aug. 31, 2010]

Sharon King having filed a petition for panel-rehearing, or, in the alternative, for rehearing *en banc,* and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc,*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK.

/s/ CATHERINE O'HAGAN WOLFE
CATHERINE O'HAGAN WOLFE

[SEAL OMITTED]

APPENDIX C

18 U.S.C. 924(c)(1) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(3)

DOCKET NO. 10-681

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

-against-

DONAHUE DEWAR AND SHARON KING,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent DONAHUE DEWAR

By: Clinton W. Calhoun, III
Briccetti, Calhoun & Lawrence, LLP
81 Main Street, Suite 450
White Plains, New York 10601
E-Mail: ccalhoun@bricallaw.com
Tel: (914) 946-5900

Respondent's Counsel

QUESTION PRESENTED

The question presented is whether respondent Dewar's sentence of 240 months imprisonment, upon his convictions for drug trafficking offenses and for a firearms offense under 18 U.S.C. § 924(c), was improper or unjust.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CITED AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 3

CONCLUSION 6

TABLE OF CITED AUTHORITIES

Page

Cases

Abbott v. United States, 131 S.Ct.18 (2010) 3, 4

United States v. Whitley, 529 F.3d 150 (2d Cir.2008) 3, 4

United States v. Williams, 558 F.3d 166 (2d Cir. 2009) 3, 4

Statutes

18 U.S.C. § 924(c) 1, 1, 2

21 U.S.C. § 841(b)(1)(A) 1

21 U.S.C. § 851(b) 5

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

-against-

DONAHUE DEWAR AND SHARON KING,

Respondents.

STATEMENT OF THE CASE

Respondents Donahue Dewar ("Dewar") and Sharon King ("King") were indicted for various narcotics-trafficking crimes and for a violation of 18 U.S.C. § 924(c), which prohibits the use or carrying of a firearm during or in relation to, or the possession of a firearm in furtherance of, a drug-trafficking crime or a crime of violence. Following a jury trial, the respondents were convicted of these charges. At sentencing, the district court found that Dewar was subject to a mandatory minimum of 20 years upon the drug-trafficking conviction under 21 U.S.C. § 841(b)(1)(A) and a Sentencing Guidelines range of

240-262 months. (Dewar Sent. Tr. 36). The government sought a consecutive five-year sentence for the conviction under 18 U.S.C. § 924(c), but the district court, applying correctly the law of the Second Circuit at that time, declined to do so. The court sentenced Dewar to 240 months in prison.[1]

All parties appealed. The court of appeals affirmed in the district court in all respects in a Summary Order filed April 29, 2010. Petition for Writ, Appendix A. The respondents petitioned for rehearing but the last of those petitions was denied on August 31, 2010. Petition for Writ, Appendix B. Subsequently, a mandate was issued by the court of appeals on December 12, 2010.

After his petition for rehearing was denied, Dewar petitioned this Court for a writ of certiorari under docket number 10-7163. The government waived its right to respond and the Court denied Dewar's petition in an Order dated November 29, 2010.

---

[1] Similarly, the district court sentenced King in a separate proceeding to 121 months in prison, upon finding a mandatory minimum of 120 months for the trafficking conviction, but declined to impose a consecutive sentence for the § 924(c) conviction.

Following this Court's decision in Abbott v. United States, 131 S.Ct.18 (2010), the government filed its own petition for a writ of certiorari seeking vacatur of the district court's judgment and a remand for further proceedings in light of Abbott. The Clerk's Office was directed by the Court to request that a response be filed and did so in a letter to Respondents' counsel dated January 3, 2011. This submission constitutes Dewar's response. For the reasons stated below, the government's petition for a writ should be denied.

REASONS FOR DENYING THE PETITION

As it did with Dewar's petition for a writ of certiorari, the Court should likewise deny the government's petition.

1. The Court's decision in Abbott, although at odds with the decisions of the Second Circuit in United States v. Williams, 558 F.3d 166 (2d Cir. 2009) and United States v. Whitley, 529 F.3d 150 (2d Cir.2008), did not explicitly overrule those decisions or address their continuing viability. This Court has, since Abbott, granted the government's petition for a writ of certiorari in United States v. Williams, under docket number 09-466, vacated the judgment in that

case, and remanded it for further proceedings. It is submitted that the Williams case itself is the appropriate vehicle to determine the effect of Abbott v. United States upon the continuing authority of United States v. Williams within the Second Circuit.[2]

2. The present case is not an appropriate vehicle. The decisions in this case in the district court and subsequently in the Court of Appeals rest upon the authority of one case that is final (Whitley) and one case that has been reopened but not reversed (Williams). The Second Circuit, and the district court, should be allowed to evaluate its decisional law in light of Abbott, which it has not yet done, before additional judgments are vacated and the cases remanded.

3. In any event, it is clear that the district court in this case was not constrained by the Whitley and Williams decisions to impose a sentence lower than it thought appropriate. As noted, it determined Dewar's Guidelines range to be 240-262 months. The district court, in addressing one of Dewar's arguments at sentencing, pointedly noted:

---

[2] No party petitioned for a writ of certiorari in United States v. Whitley, supra. The judgment in that case thus became final.

> [I]t is my view that a sentence of twenty years or 240 months was or is the appropriate sentence regardless of what the mandatory minimum is; that in light again of this defendant's history and characteristics and the circumstances of this offense, that some very significant punishment needs to be put in place. And, so, whether a ten or a twenty-year mandatory minimum sentence were found, I would have imposed a sentence of 240 months, and I just want that to be clear.

(Dewar Sent. Tr. 50). On appeal, the Second Circuit found that "[t]his lucid statement renders any error harmless," Petition for Writ, Appendix A at 5a (emphasis added).[3] Thus, in no sense did Dewar elude punishment that the district court wished to impose but thought it could not. Rather, the court was clear that it viewed 240 months as the appropriate term of imprisonment and that is precisely the

---

[3] The circuit court made this decision despite its recognition that the district court had failed to follow the procedure mandated by 21 U.S.C. § 851(b) with respect to the prior felony information filed in this case, a point raised by Dewar in his appeal and his petition to this Court. If the failure to follow that statute did not prevent the district court from arriving at a proper sentence, the same analysis should be applied to the district court's interpretation of § 924(c) and its adherence to Whitley and Williams in sentencing Dewar. Because the court could have imposed a higher sentence but did not, that interpretation did not prevent it from arriving at what it considered the proper sentence and the judgment should not be disturbed on that basis.

sentence it imposed. As the Second Circuit decided, the district court's statement rendered "any" error harmless because it concluded that no error occurred that caused an unjust sentence. That finding should apply with equal force to any perceived error alleged by the government. The Petition thus presents no new issue of law and no compelling reason to issue a writ of certiorari.

4. Dewar respectfully asks that he be permitted to adopt any arguments submitted by respondent King, to the extent they are applicable to him.

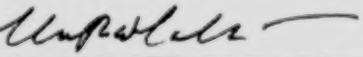
CONCLUSION

Based on the foregoing, this Court should deny the Petition for a Writ of Certiorari.

DATED: White Plains, New York
January 27, 2011

Respectfully submitted,

RESPONDENT DONAHUE DEWAR

BY: 

Clinton W. Calhoun, III
Briccetti, Calhoun & Lawrence, LLP
81 Main Street, Suite 450
White Plains, New York 10601
E-Mail: ccalhoun@bricallaw.com
Tel: (914) 946-5900

Supreme Court, U.S.
FILED
FEB 1 - 2011
OFFICE OF THE CLERK

No. 10-681

In the

SUPREME COURT of the UNITED STATES

October Term, 2010

UNITED STATES OF AMERICA,

Petitioner,

against

DONAHUE DEWAR and SHARON KING,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR SHARON KING IN OPPOSITION

JEREMY GUTMAN
233 Broadway, Suite 2707
New York, New York 10279
jeremygutm@aol.com
(212) 644-5200
Counsel of Record
for Respondent Sharon King

QUESTION PRESENTED

Whether the government's petition for certiorari in this case should be granted because of the Court's decision in *Abbott v. United States*, 562 U.S. ____, 131 S.Ct. 18 (2010).

TABLE OF CONTENTS

QUESTION PRESENTED i

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Abbott v. United States, 562 U.S. ___, 131 S.Ct. 18 (2010) 3, 4

United States v. Williams, 558 F.3d 166 (2d Cir. 2009 ..... 3, 4

United States v. Williams, 131 S.Ct. 632 (2010) 4

Rules

Rules of the Supreme Court, Rule 10 4

No. 10-681

In the

SUPREME COURT of the UNITED STATES

October Term, 2010

UNITED STATES OF AMERICA,
Petitioner,

against

DONAHUE DEWAR and SHARON KING,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR SHARON KING IN OPPOSITION

Petitioner Sharon King ("King") respectfully submits this brief in opposition to the petition for certiorari filed by the government in this case.

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit, unofficially reported as *United States v. Dewar*, 375 Fed.Appx. 90 (2d Cir. 2010), appears as Appendix A to the government's petition (Pet. App. A). The Order of the United States Court of Appeals for the Second Circuit denying respondent's motion for rehearing and rehearing *en banc* appears as Pet. App. B to that petition.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was entered on April 29, 2010. (Pet. App. A) King's petition for rehearing and rehearing *en banc* was denied by the court of appeals on August 31, 2010. (Pet. App. B) The government's petition for certiorari was filed on Nov 24, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A jury convicted King of conspiracy to distribute and possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 846 [count 1]; distribution and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(b)(1)(B) [count 3]; distribution and possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(b)(1)(D) [count 4]; and using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) and (2) [count 5]. Thereafter, she was sentenced to an aggregate term of imprisonment of 121 months, consisting of terms of 121 months on counts 1 and 3, 60 months on count 4 and 0 months on count 5, all of which were imposed concurrent to each other, to be followed by an aggregate five-year term of supervised release. She is currently incarcerated pursuant to that sentence.

King appealed her conviction and sentence; the government appealed the sentence imposed with particular reference to the district court's failure to impose a consecutive five-year sentence under 18 U.S.C. § 924(c). Recognizing that the sentence imposed by the district court was proper under circuit precedent, as articulated in *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009) and *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), the government asked the circuit court of appeals to defer ruling on its appeal of King's sentence until there was a decision in this Court on then-pending questions in two cases in which certiorari had been granted. The circuit court declined to do so, and affirmed the district court's judgment. (Pet. App. A, pages 5a-6a)

Both King and the government filed petitions for certiorari. The former petition is presently pending before the Court in No. 10-7768, *Sharon King v. United States*.

ARGUMENT

The government asks the Court to grant its petition, vacate the judgment and remand the case for further proceedings in light of *Abbott v. United States*, 562 U.S. ___, 131 S.Ct. 18 (2010). One of the cases cited by the court of appeals in declining to defer its decision on the government's appeal of King's sentence, *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), was referenced in *Abbot*,

131 S.Ct. at 24 n.2, as comprising a part of the "division among the Circuits." *Id.* at 24. Subsequent to *Abbot*, this Court granted certiorari in connection with the *Williams* case, v ted the judgment and remanded to the Second Circuit in light of *Abbot*. *United States v. Williams*, 131 S.Ct. 632 (2010).

While recognizing that *Abbot* implicates the correctness of the Second Circuit's decision in this case, King urges this Court to deny the petition for certiorari. Under Rule 10 of the Court's Rules, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." That rule goes on to state that "certiorari will be granted only for compelling reasons." Because the Court has resolved the conflict among the circuits with regard to the interpretation of § 924(c), we submit that no "compelling reason" exists for this Court to exercise its discretion by granting the government's petition for certiorari at this time. Accordingly, we ask that it be denied.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JEREMY GUTMAN
233 Broadway, Suite 2707
New York, New York 10279
jeremygutm@aol.com
(212) 644-5200
Counsel of Record
for Respondent Sharon King

Dated: New York, New York
February 1, 2011